No. 16,082

IN THE

United States Court of Appeals

For the Ninth Circuit

KENNETH WALKER and JOSEPHINE WALKER,
Appellants,

vs.

FAIRBANKS INVESTMENT COMPANY,
Appellee.

On Appeal from the District Court of the United States for the State of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

WALTER SCZUDLO,
130 Lacey Street,
Fairbanks, Alaska,
Attorney for Appellee.

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FAIRBANKS INVESTMENT COMPANY,
Appellee.

On Appeal from the District Court of the United States for the State of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

NATURE OF CASE.

Plaintiffs were seeking in the District Court to divest the interest of defendants, Chester W. Jackson and Martha L. Jackson, purchasers under a real estate contract, and the interest of defendant, Fairbanks Investment Company, assignee of James B. and Mary Fern Ing, sellers under said contract. Plaintiffs claimed that they had a judgment lien against all of James B. Ing's interest in the real property covered by said contract, and that the conveyances of said interests were not effective as against the plaintiffs'

judgment lien, since said conveyances were not recorded at the date of the entry of said judgment against James B. Ing. The plaintiffs appeal from decision granting the Jacksons' motion for summary judgment, and Fairbanks Investment Company's motion to dismiss this cause.

PLEADINGS.

Since the decision of the trial court was based on motions for summary judgment and to dismiss, it is necessary to examine the pleadings filed.

Complaint.

On January 9, 1958, a complaint in the above entitled cause was filed against said Jacksons, Fairbanks Investment Company, and James B. Ing and his wife. (Transcript 1-8, hereafter called Tr.) The complaint, among other things, alleged that on October 25, 1957, in a separate action numbered 7807, filed by the appellants against James B. Ing, the District Court announced in open court a finding in favor of said appellants and an award of a judgment in the sum of $20,000.00. Their request for an additional $24,226.43 in special damages was withheld until submission of briefs. On November 9, 1957, there was a finding that appellants were entitled to said special damages, and judgment was entered and docketed against James B. Ing, in the total sum of $44,226.43. On November 29, 1957, the court amended said judgment to reduce the

amount to $37,673.10. Executions had been issued on November 20, 1957, against Ings' property and were returned unsatisfied. James B. Ing and his wife, on November 4, 1957, for the sum of $5,000.00, had assigned to the appellee all their interest, by instrument dated November 4, 1957, to the real estate contract dated October 31, 1956, existing between the Ings, as sellers, and the Jacksons, as purchasers, which contract was the subject of an escrow in the Alaska National Bank of Fairbanks. In addition, the assignors had executed a quit-claim deed conveying their interest to the property covered by said contract and assignment "for use in the event of breach or default on the part of said purchasers". This assignment was recorded on December 18, 1957. The appellants alleged that it was void as against their judgment lien by virtue of *ACLA, 1949,* as amended, 55-9-63. Said real estate contract between the Ings and the Jacksons was executed on October 31, 1956, and recorded December 20, 1957, and appellants alleged that under said statute it was void as against their judgment lien.

Plaintiffs' motion for summary judgment.

On February 21, 1958, plaintiffs filed a motion for summary judgment *only against Fairbanks Investment Company,* (Tr. 9) together with affidavit by their attorney, Mr. Merdes (Tr. 10-13).

Motion to dismiss by defendants Ing.

On March 5, 1958, defendants James B. Ing and Mary Fern Ing filed a motion to dismiss.

Motion to dismiss or in alternative for summary judgment by other defendants.

On March 31, 1958, said Chester W. and Martha L. Jackson, and Fairbanks Investment Company, filed their motion to dismiss this cause, because the complaint failed to state a claim against said defendants upon which relief can be granted, or in the alternative, for a summary judgment on the ground that there was no genuine issue as to any material fact, and that said defendants were entitled to judgment as a matter of fact. (Tr. 14)

In support of said motions and in opposition to plaintiffs' motion for summary judgment, said defendants had filed affidavits of Chester W. Jackson (see Tr. 46), and the following officers and directors of said Fairbanks Investment Company: Wilbur Walker, president; Wallace Cathcart; Louis Krize, secretary; and Edward F. Stroecker, treasurer. (Tr. 15-18.)

STATEMENT OF FACTS.

The following is a brief summary of the facts predicated on the pleadings and the affidavits, which were uncontroverted at the time of the hearing on the motions:

Ing's title.

On October 23, 1953, defendant, James B. Ing, became vested with fee simple title to Lot (4), Block (52) of the Townsite of Fairbanks, by virtue of deed

executed on that date. Said deed was recorded on October 28, 1953. (Tr. 4)

Sale to Jacksons.

On October 31, 1956, James B. Ing and Mary Fern Ing entered into a written real estate contract, as sellers, with Chester W. Jackson and Martha L. Jackson, buyers, for sale of said property. (Tr. 11, 32-38) The balance of the purchase price was payable monthly in installments of $250.00, to be paid to Alaska National Bank of Fairbanks, escrow agent, and by the latter applied to discharge payments due under a prior mortgage, and in reduction of sellers' equity. The Jacksons have had possession of said property since approximately November 1, 1956. (See Tr. 46.) They now occupy it, and have been making monthly payments under said contract on the balance of the purchase price remaining due.

Assignment by Ings.

On November 4, 1957, said James B. Ing and Mary Fern Ing, sold and assigned, in writing, all their right, title and interest as sellers under said real estate contract, and all the proceeds (balance of $6,905.23) (Tr. 7), and benefits thereunder, to Fairbanks Investment Company, a corporation, for a consideration of $5,000.00, paid on that date by said corporation to James B. Ing and Mary Fern Ing. Reference was made in said assignment to said contract as being the subject of an escrow at Alaska National Bank of Fairbanks. In addition, they executed and delivered a quit-claim deed to said corpo-

ration, "for use in event of breach or default on the part of said purchasers". (Tr. 15, 16) This transaction was open and public, and not secret, since assignee desired payments under contract to come to it, through said escrow agent.

Fairbanks Investment Company.

The following persons constitute the Board of Directors of said corporate defendant: Phil Anderson, Wallace Cathcart, Jr., Joe Franich, Lloyd Burgess, Louis E. Krize (secretary), Robert B. Hoitt, Edward F. Stroecker (treasurer), Wilbur Walker (president), Lee Linck, and Walter Sczudlo (vice president and counsel for said company on this appeal). The company is in the business of buying and selling investments in both real properties, and in contracts and negotiable instruments. Under said assignment of all interest of the Ings as sellers, under said contract, said corporate assignee became entitled to all the proceeds under the contract payable to the sellers under this contract, more specifically the monthly payments, a personal property interest. The buyers under said contract were entitled to continue in possession of the property in question, and did continue in possession. (Tr. 15-16)

Plaintiffs' judgment.

On November 9, 1957, plaintiffs obtained the entry of judgment against James B. Ing in Civil Cause No. 7807, *Walker, et al. vs. Ing,* arising out of a claimed breach of contract involving sale of the Shamrock Bar

and skating rink by the Walkers to Ing. (Tr. 10) It was amended on November 29, 1957. (Tr. 2)

Defendants purchasers in good faith for value and no intent to defraud.

At no time before entry of said judgment against James B. Ing did defendants Chester W. Jackson, Martha L. Jackson, or Fairbanks Investment Company, a corporation, have knowledge of proceedings in Cause No. 7807, or that a judgment was imminent in that cause. In all their transactions with James B. Ing and Mary Fern Ing with respect to said property and contract of sale and assignment, said defendants acted as purchasers in good faith for value, and acted without any intent to hinder or defraud creditors of James B. Ing, or any other party. (Tr. 16, and 46.)

SUMMARY OF ARGUMENT.

Statement of Law.

I. The assignment of Mr. and Mrs. Ings' interest, as vendors under the Jackson contract, to appellee, although unrecorded on November 9, 1957, the date of entry of the Walker judgment, is not void against the lien of said judgment under *ACLA 1949,* 55-9-63, because the open possession of land by the vendees under the contract of said owners to sell and convey it to them upon the payment of the purchase price in monthly installments, described in the con-

tract, is notice to creditors of the vendors, of the contract terms, and of any unrecorded assignment of the proceeds of such monthly payments made before the entry of the judgment or other grant of credits.

1. Admission of appellants.
2. Statutes regarding extent of judgment lien.
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4. Meaning of word "void".
   (a) Oregon statute.
   (b) Interpretation and construction of Oregon statute.
5. General law on possession of property as giving actual notice.
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7. Uniform recording plan in Alaska.
8. Factors throwing light on legislative intent.
   (a) A judgment lien has no superior dignity to that of other liens.
   (b) The general law applicable to recordation of judgment liens applies in Alaska.
   (c) There is no indication that the Alaska legislature intended by *ACLA 1949,* 55-9-63, to depart from the purpose of its general recording plan.
   (d) Appellants' proposed construction of the Alaska statute would obviously lead

to an inequitable result, and many clouds on title.

II. The interest of the vendor or his assignee under an executory land contract is personal property, and therefore, is not covered by judgment lien statute.

III. Judgment lien statute does not contemplate recordation of executory contracts for sale of land.

IV. Appellants' position is not supported by their authorities.

STATEMENT OF LAW.

I. THE ASSIGNMENT OF MR. AND MRS. ING'S INTEREST, AS VENDORS UNDER THE JACKSON CONTRACT, TO APPELLEE, ALTHOUGH UNRECORDED ON NOVEMBER 9, 1957, THE DATE OF ENTRY OF THE WALKER JUDGMENT, IS NOT VOID AGAINST THE LIEN OF SAID JUDGMENT UNDER ACLA, 1949, 55-9-63, BECAUSE THE OPEN POSSESSION OF LAND BY THE VENDEES UNDER THE CONTRACT OF SAID OWNERS TO SELL AND CONVEY IT TO THEM UPON THE PAYMENT OF THE PURCHASE PRICE IN MONTHLY INSTALLMENTS, DESCRIBED IN THE CONTRACT, IS NOTICE TO CREDITORS OF THE VENDORS, OF THE CONTRACT TERMS, AND OF ANY UNRECORDED ASSIGNMENT OF THE PROCEEDS OF SUCH MONTHLY PAYMENTS MADE, BEFORE THE ENTRY OF THE JUDGMENT OR OTHER GRANT OF CREDITS.

1. Admission of appellants.

Although denied and heatedly contested in the trial court, the appellants have now conceded (their brief, p. 7) that Mr. and Mrs. Jackson's interest, as vendees under a contract of purchase with the Ings, is not

void under the statute above cited, and as alleged in their complaint, under the principle "which holds that possession of the premises by vendee under a contract of sale constitutes constructive notice of the vendee's interest in the property to third persons, including judgment creditors of the vendor".

The principle in question, and formulated generally by the courts, is to the effect that possession of real property is a fact putting all persons on inquiry as to the nature of the occupant's claim, *as well as the claim of the person under whom he occupies.* (87 *ALR,* 1530-1540, and numerous cases cited, including the *Lynch* case, hereinafter mentioned.)

2. Statutes regarding extent of judgment lien.

The two statutes involved in this case regarding judgment liens are § 55-9-61, *ACLA, 1949,* as amended by Chapter 52, SLA 1955, and § 55-9-63, *ACLA, 1949.*

The pertinent portion of the former statute is as follows:

> ". . . from the date of docketing a judgment in the judgment docket of the District Court, such judgment shall become a lien upon all the real property of the defendant within the recording district wherein the District Court maintains such judgment docket, and upon all the real property which the defendant may afterwards acquire therein, during the time an execution may issue thereon. . . ."

§ 55-9-63, *ACLA 1949,* reads as follows:

> *"When conveyance void against lien.* A conveyance of real property or any portion thereof

or interest therein shall be void against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment or the transcript thereof, as the case may be."

3. Leading case.

The leading case on the issues involved herein is *Frank Lynch Co. v. National City Bank of Chicago,* 1919, 261 F. 480.

Facts of the case. The Northern Trading Company made a contract with Arno Kresse to sell and convey to him certain real estate, free from any encumbrances, upon his payment of six promissory notes given for a part of the purchase price, maturing at various dates between November 1, 1913, the date of the contract, and October 21, 1921. Kresse immediately took possession, and continued in possession of the land. There were two recorded mortgages, which covered the land in question, and other lands. On January 21, 1916, there was owing by Kresse on his notes and contract, approximately $4,655.00 and some interest. There were also principal balances due on the first and second mortgages. On that day, for a valuable consideration, the Trading Company indorsed Kresse's notes, and sold and delivered them, together with a written assignment of them, and of the contract, and the title, both to the land in question and to other land, to Frank Lynch Company, and delivered to it a deed thereof. On the following day, January 22, 1916, before the assignment of the contract or the deed were recorded, the National City Bank of Chicago recovered and docketed a judgment for $15,711.50

against the Trading Company, in whose name the title to the land in question, subject to the two mortgages, appeared of record at that time.

Both the Bank and Lynch Company claimed that they were entitled to payment of the amount Kresse still owed for the purchase of the land in question, and he brought this action against each of them and against the respective holders of the two prior mortgages, offering to pay the amount he still owed on his notes, and prayed that the validity and priority of the liens on the land in question be adjudged.

North Dakota statute applied. The recording acts of North Dakota in effect at that time provided as follows:

> ". . . every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void * * * as against any attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance, *(Compiled Laws of North Dakota, 1913,* §5594); that the term "conveyance", as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, * * * or by which the title to any real property may be affected, except wills and powers of attorney" (section 5595); and that 'every instrument, except a will in execution of a power, even though the power is one of revocation only,

> is to be deemed a conveyance within the meaning of the chapter on recording transfers' (section 5413)."

Law applied to facts of case. The court held, in effect, with respect to the rights of assignee of vendor's rights in land contract against vendor's judgment creditor, as follows:

> That "the possession of one who entered on land under a contract for the purchase thereof on installments is not only notice to the whole world of his rights, though the contract was not recorded as authorized by Comp. Laws N.D. 1913, §5594, but is notice that notes given for deferred purchase money may be negotiated, and where such notes were negotiated for a valuable consideration and the contract assigned, the assignee takes priority of one who recovered judgment against the original vendor before the assignment of the contract, etc., was recorded."

The court further stated, with respect to the statute above cited, that:

> "But there is an implied general exception to the broad statement of recording statutes that unrecorded deeds and assignments of interests in real estate shall be void, to the effect that such grantees named therein and such judgment creditors as have actual or constructive notice of such unrecorded deeds or assignments are not protected by the recording statutes. *A contract by the owner of land to convey it to a grantee upon the future payment of installments of the purchase price, followed by the immediate possession of the land thereunder by the vendee, falls within*

this exception, although such a contract falls clearly far within the terms of the recording statutes. It is an 'instrument in writing * * * by which the title to any real estate may be affected'. Counsel for the bank concede that it is unnecessary to record such a contract and that such a contract supported by the possession of the vendee thereunder is not void as against a judgment creditor of the vendor notwithstanding the clear declaration of the statutes that every such conveyance is void. And why is it not void? *Because the open possession of the land by the vendee is notice to all the world of the title and of the contract under which he claims, and of all the terms thereof,* and because, when a vendor makes such a contract, he holds the legal title in trust for his cestui que trust, his vendee. The subsequent judgment creditor, the bank, therefore, had notice by the possession of Kresse when it docketed its judgment that the Trading Company's title to the southeast quarter was subject to Kresse's contract and his right thereunder, that Kresse had given his negotiable promissory notes for the unpaid purchase price, that they were negotiable, and that they might have been discounted or sold, or assigned to some third person." (Italics added.)

"* * * The open possession of land by a vendee under the contract of the owner to sell and convey it to him upon the payment of the part of the purchase price thereof evidenced by his negotiable notes described in the contract is notice to grantees, mortgagees, and judgment creditors of the vendor of the contract, of its terms, and of any unrecorded transfer by the vendor of the

vendee's notes to a third person made before the vendor made his grants or mortgage of the land, or before the judgment against him was docketed, and the transferee of the notes has, notwithstanding the recording statutes, the superior right to the payment of the notes to himself. The Trading Company in this case for value endorsed, sold, delivered, and assigned the promissory notes of Kresse to the Lynch Company before the judgment of the bank was docketed. The open possession of the land by Kresse under his contract or purchase was notice to the bank of that contract and of this sale and transfer when its judgment was docketed, although the assignment and deed accompanying the transfer were not recorded and the right of the Lynch Company to the notes, to the payments thereof to it, and to the fund derived from their payment, was under this settled rule of law on this subject in North Dakota superior to the right of the bank thereto and superior to the lien of its judgment either on the fund or on the land. The bank's judgment lien was subject to the liens of the two mortgages on the two quarter sections and to the right of the Lynch Company to the payment to it out of the southeast quarter section of the unpaid notes of Kresse, and to the fund such payments should produce."

Cases cited in Lynch decision. Two cases are cited in the *Lynch* decision, which are particularly relevant to the instant case:

Curtis v. Moore, 1897, 152 N.Y. 159, 163, 46 N.E. 168, 57 Am. St. Rep. 506, concerned an unrecorded as-

signment of a mortgagee's interest. The facts of that case are as follows: The mortgagee assigned his interest as mortgagee to an assignee. The assignee failed to record his interest. Later, the mortgagor conveyed his interest to the mortgaged premises to the mortgagee. The mortgagee then apparently held himself out to a Mr. Moore as the owner of the property in fee simple. Mr. Moore apparently assumed that the former mortgagee had good title to the land, and proceeded to purchase the property from the former mortgagee. Mr. Moore recorded his title to the property before the assignee recorded his assignment. The issue, of course, is the effect of the failure of the assignee of the mortgage to record his interest. The answer given by the court is as follows:

> "Mr. Moore was not a bona fide purchaser, within the principle established by those authorities, because the record of the mortgage was notice to him that the mortgage was outstanding and unsatisfied, and it was no concern of his who happened to be the owner at the time In dealing with the property on the assumption that Edward S. Curtis (mortgagee) still owned the mortgage, he acted at his peril, and assumed the risk that Curtis might have transferred the mortgage to someone else."

By liberal use of paraphrasing, defendant will show that the fact situation in the *Curtis* case is quite similar to that in this case.

The Walkers were put on notice that the property once owned by James B. Ing was encumbered or possessed by a third party. They were put on such

notice because of the occupation of said property by the Jacksons. Jacksons' occupancy was notice to the Walkers that either the Jacksons had title to the property in fee simple, or that an executory land contract was outstanding and unsatisfied. In dealing with the property on the assumption that James B. Ing still owned an interest as vendor under said contract, the Walkers acted at their peril, and assumed the risk that James B. Ing might have transferred the contract to someone else.

The court, in the *Lynch* case, also discussed *Quaschneck v. Blodgett,* 32 N.D. 603, 612, 156 N.W. 216, 218. The following is quoted from page 484 of the *Lynch* decision:

> "Hall was the owner of the land and Quaschneck was his vendee in possession, under Hall's unrecorded contract to convey, in which the deferred payments of the purchase price were evidenced by the vendee's negotiable notes payable to Hall. One of Quaschneck's notes was for $3,700.00, and Hall assigned it to the Amboy Bank as collateral security for his debt to that bank. Afterwards Hall mortgaged the land to Caldwell, and Caldwell assigned the mortgage for value to Blodgett. The mortgage was recorded October 12, 1908, and the assignment was recorded December 5, 1908. Blodgett took the mortgage for value, in good faith, in reliance on the record title, and the question was whether the Bank of Amboy or Blodgett had the better right to the moneys owing by Quaschneck on his note held by the bank. The Supreme Court of North Dakota held: (1) That Quaschneck's contract for a deed was subject to the recording acts; that the recording acts were in-

applicable to that cause, because Quaschneck's open possession of the land under a contract gave notice to all the world of his rights; and (2) that that possession also gave notice to the mortgagee in, and to the assignee of, the mortgage, not only of Quaschneck's note to the Bank of Amboy, and of that bank's rights, and that the bank's right to the payment of Quaschneck's note pledged to it was superior in law and in equity to the claim thereto of Hall's mortgagee, or of that mortgagee's assignee."

Principle underlying Lynch, Curtis and Quaschneck cases. The principle underlying these cases is simple. Once a potential vendee (or judgment creditor) has notice of the existence of a possible executory land contract, he is also simultaneously put on notice that the vendor may have alienated his interest under such an executory land contract. This is a particularly reasonable inference, since the vendor's or mortgagee's interest is frequently reflected by a promissory note. Promissory notes generally are negotiable and assignable. Even if the vendor's or mortgagee's interest is not reflected by such a note, anyone dealing with such a party should know that such interests easily lend themselves to transfers and assignments. A reasonably prudent man would contemplate the likelihood of such a transfer, when he deals with a vendor or mortgagor and would make full inquiries before proceeding in transactions with a vendor or mortgagee. He would not rely on record title alone. The interests of a vendor under a contract are considered by many financial institutions as analogous to a mortgagee's interest.

4. Meaning of word "void".

The major issue in this case concerns the proper construction of the word "void", under said statute, *ACLA 1949,* 55-9-63. The issue is, "void against whom?". Fortunately, the answer is clear. It means: Void against judgment creditors, who acquired such judgment lien in good faith without knowledge or notice, actual or constructive, of such prior unrecorded conveyance of *real property,* or assignment of proceeds under an executory contract of sale.

(a) Oregon statute.

The Alaska statute is drawn directly from §18,370 of the Oregon Revised Statutes (formerly designated as 1862; D268; H271; BC207; LOL207; OL207; OC2-1603; OCLA6-803). That statute reads as follows:

> "*When conveyance void against lien.* A conveyance of real property or any portion thereof or interest therein shall be void against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment or the transcript thereof, as the case may be."

(b) Interpretation and construction of Oregon statute.

United States v. Griswold, (Ore. 1881), 8 F. 572, well states the rule with respect to the proper construction to be given to the statute.

> "In equity, a judgment creditor has not been regarded as a purchaser in the sense of the rule which prefers the right of a *bona fide* purchaser for a valuable consideration to a prior title under an unregistered deed. Story, *Eq. Jur.,* §§1502, 1503a."

"The fact that the conveyance of a subsequent purchaser, though first recorded, is not allowed by the analogous section 268 aforesaid to prevail over that of a prior purchaser, unless obtained in good faith, is a good reason why a court of equity, in administering and construing said section 268, should presume that the legislature, in enacting it, did not intend to make a conveyance void as against a subsequent judgment lien, unless the latter was acquired in good faith".

The following annotations to §18,370 of Oregon Revised Statutes make it abundantly clear that there is only one proper interpretation of the statute. Thus:

"The intention of the legislature was to give a creditor under an attachment, judgment or execution the same standing in regard to his right in or to the property which he would gain by a purchase of the property from the debtor." *Riddle v. Miller,* (1890) 19 Or. 468, 23 P. 807.

"The lien of a judgment will not prevail over a prior unrecorded conveyance unless it also appears that the lien was taken or acquired in good faith without knowledge or notice of such prior unrecorded conveyance." *Baker v. Woodward,* (1884) 12 Or. 3, 6 P. 173; *Laurent v. Lanning,* (1897) 32 Or. 11, 51 P. 80; *Crossen v. Oliver,* (1900) 37 Or. 514, 61 P. 885; *Western Savings Co. v. Currey,* (1900) 39 Or. 407, 65 P. 360, 87 Am. St. Rep. 660; *Belcher v. LaGrande Nat. Bank,* (1918) 87 Or. 665, 171 P. 410; *Thompson v. Hendricks,* (1926) 118 Or. 39, 245 P. 724; *United States v. Griswold,* (1881) 8 Fed 556, 571.

"A judgment creditor who is informed of an outstanding equity or of facts sufficient to put him

on inquiry at the time his lien attached takes subject thereto." *Stannis v. Nicholson,* (1868) 2 Or. 332; *Riddle v. Miller,* (1890) 19 Or. 468, 23 P. 807.

"Possession of a purchaser under unrecorded deed charges the judgment creditor with notice of the grantee's rights, though the premises were in possession of the same persons before and after conveyance." *Belcher v. LaGrande Nat. Bank,* (1918) 87 Or. 665, 171 P. 410.

5. **General law on possession of property as giving actual notice.**

"Possession of land is notice to the world of every right that the possessor has therein, legal or equitable; it is a fact putting on inquiry as to the nature of the occupant's claims as well as the person under whom he claims." *American Jurisprudence, Notice and Notices,* § 18, *Possession of Land.*

"Possession of land is a fact putting all persons on inquiry as to the nature of the claim of the occupant and of the person under whom he occupies . . ." *American Jurisprudence, Vendor and Purchaser,* § 712, *Possession and Use of Property.*

In the instant case, plaintiff had been put on inquiry as to the interests of the Jacksons, as purchasers of land, who were in possession, open and notorious, since approximately November 1, 1956, and of the interest of Fairbanks Investment Company, Inc., the party under whom they occupy the premises. There was no proof or facts shown, or alleged, in appellants' complaint or affidavits that any inquiry was made by

them of the Jacksons as to the nature of their claim and of the person under whom they occupied. There was nothing shown by the appellants that such inquiry would not have disclosed that payments were being made to the escrow agent and by the latter to the prior mortgage holder, and to the assignee of the vendors.

6. General law on actual notice.

> "It is an elementary rule in the construction of recording laws that notice of an unrecorded instrument is equivalent to recording of it, with respect to the person having such notice. As a general rule, an unrecorded deed or other instrument affecting the title to land is valid, therefore, against a subsequent purchaser taking with knowledge or notice of the existence of the instrument; and while this exception is usually the result of construction, yet is sometimes expressly declared by the statute." *American Jurisprudence, Records and Recording Laws,* § 172, *Effect of notice other than record.*

7. Uniform recording plan in Alaska.

The general recording statute in Alaska is § 22-3-25, *ACLA 1949,* as amended by Ch. 9, *SLA 1955,* which reads as follows:

> "Every conveyance of real property within the Territory of Alaska hereafter made, other than a lease for a term not exceeding one year, shall be void as against any subsequent innocent purchaser or mortgagee in good faith and for a valuable consideration of the same real property or any portion thereof, whose conveyance shall be

first duly recorded. An unrecorded instrument is valid as between the parties thereto and those who have actual notice of it."

This is the type of recording statute common throughout the United States. It gives potential vendees and transferees full protection from fraudulent conveyances. That is the only purpose of the statute and the purpose is fully achieved. §22-4-3, *ACLA 1949,* relates directly to fraudulent conveyances. It, too, is consistent with §22-3-25, *ACLA 1949,* and is completely inconsistent with appellants' proposed construction of the judgment lien statutes. It provides as follows:

"*Purchasers with notice.* No such conveyance or charge shall be deemed fraudulent in favor of a subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefited by such charge, was privy to the fraud intended."

Thus, it would appear that the Alaskan legislature intended to erect a uniform recording plan for the recordation of all interests subject to recordation, including judgment liens. It also appears that the legislature intended the same consequences upon failure to record should be borne in equal degree by any holders of unrecorded interests, without particular discrimination against any one class of such holders. In short, the term "purchasers or lienors" *without notice* is a common denominator of all the Alaska

statutes regarding recordation, whether this is spelled out in the statutes in that particular manner or not.

8. Factors throwing light on legislative intent.

There is no indication that the legislature intended to depart from the general rules applicable to judgment lien statutes. In support of appellants' construction of the judgment lien statute, appellants are compelled to urge that the Alaska legislature intended one or more of the following:

(a) That a judgment lien should be given some superior dignity to all other liens.

(b) That Alaska should have a set of recording laws entirely inconsistent or in conflict with each other, and with recording laws as they exist in the various states of the union.

(c) That the legislature intended that holders of interests in property potentially subject to judgment liens against prior owners could be suddenly and inequitably divested of their interests by judgment creditors of such prior owners, with notice.

(d) That it was intended to subject unrecorded interests in land to many potential clouds on their title.

The following should be noted briefly with reference to each of these points:

(a) A judgment lien has no superior dignity to that of other liens.

> "A judgment lien does not prevail as against other interests upon the ground that it is of superior dignity. To the contrary, the general rule is that the lien of a judgment is subject to interests

previously acquired." *Bowling v. Garrett,* 49 Kan. 504, 31 P. 135, 33 Am. St. Rep. 377. See also *American Jurisprudence, Judgments,* §343, p. 38.

(b) The general law applicable to recordation of judgment liens applies in Alaska.

These general rules are as follows:

"Again, the general rule is that a judgment creditor having at the time judgment is entered notice of an unrecorded deed or mortgage already executed by the judgment debtor will take subject thereto." 185 U.S. 505, 4 ALR 442. See also *American Jurisprudence, Records and Recording Laws,* §§ 153, 154, 167.

"The general rule that constructive notice of an outstanding interest in land may be predicated upon possession of the property has been applied as against judgment creditors." *American Jurisprudence, Judgments,* § 362, p. 48. See also: *Groff v. State Bank,* 50 Minn. 234, 52 N.W. 651; *Allen-West Commission Co. v. Millstead,* 92 Miss. 837, 40 So. 256; *Butcher v. Kagey Lumber Co.,* (Ohio) 128 N.E. 2d 54.

It must be assumed that the Alaska legislature did not intend by *ACLA 1949,* 55-9-63, pertaining only to judgment liens, to create a recordation statute that is completely inconsistent with other Alaska recording statutes. (See pars. 1 and 7, supra.)

(c) There is no indication that the Alaska legislature intended by ACLA 1949, 55-9-63, to depart from the purpose of its general recording plan.

The evident purpose, indeed the only conceivable purpose, in enacting recording statutes is to protect

purchasers or encumbrancers of property against fraudulent conveyances.

The Alaska statutes, 22-4-1, et seq., accordingly provide for protection of innocent purchasers against fraudulent conveyances. 22-4-3 expressly limits the protection of these statutes to those purchasers who do not have actual or legal notice of the fraudulent nature of the purchase. (See sec. I, pars. 1 and 7, supra.) 22-3-25 creates the general Alaska recording scheme whereby recordation would give constructive notice only to those individuals who are "innocent purchasers in good faith and for a valuable consideration."

If the legislature had intended to give judgment liens some special dignity, and make sec. 55-9-63 inconsistent with the general recording plan adopted in Alaska, it would seem that it would have used language, which would clearly indicate that intent. For example, the legislature could have provided that all unrecorded conveyances of real property shall be void against the lien of a judgment, except as between the parties thereto, whether the judgment lienor is with or without actual notice of such conveyance. It is obvious that the legislature would not desire a judgment lienor with notice to take against innocent purchasers, unless it clearly indicated a contrary intent.

(d) Appellants' proposed construction of the Alaska statute would obviously lead to an inequitable result, and many clouds on title.

Appellee believes that the inequity of appellants' proposed construction of the statute is too manifest to require discussion. Appellee would, however, like to point out that there is the following practical danger

in construing the statute as appellants' urge. Unscrupulous individuals could examine title records. Whenever a transfer in a real property interest could be found, which was not properly recorded, a suit could be trumped up against the former holder of the property or an assignment of a dubious cause of action against the former holder might be arranged. Suit could then be brought against the former holder. It is likely that a default judgment could be obtained against the former holder of the property, and thereby a lien could be obtained against the recorded interest in his property. The statute would then be an invitation to fraud.

There have been many judgments probably rendered in past years against individuals, who have conveyed their interest in real property before the date of a judgment against the conveyor. Such conveyances have not been recorded, since the conveyances were a matter of general knowledge, either by actual or constructive notice before the date of judgment. This would certainly be true in instances where the purchaser has moved on the property of the judgment debtor before the date of the judgment. The number of possible clouds on real properties in the State of Alaska would be greatly increased, if all unrecorded interests in real property were subjected to any judgment liens, which have come into existence against the conveyors after unrecorded conveyances and within the last ten (10) years.

II. THE INTEREST OF THE VENDOR OR HIS ASSIGNEE UNDER AN EXECUTORY LAND CONTRACT IS PERSONAL PROPERTY, AND THEREFORE, IS NOT COVERED BY JUDGMENT LIEN STATUTE.

§55-9-63, the judgment lien statute, applies only to,

> "A conveyance of real property or any portion thereof or interest therein . . ."

Under the doctrine of equitable conversion, the vendor's interest in a contract of purchase and sale of real property is converted into personal property upon execution of the contract. Thus, in *American Jurisprudence, Equitable Conversion,* §11, *Contract,* it states:

> "Thus, an executory contract for the sale of land works a conversion, since equity regards 'things agreed to be done as actually performed', and treats the vendor as holding the land in trust for the purchaser and the purchaser as a trustee of the purchase price for the vendor. The vendee is, in the contemplation of equity, actually seized of the estate, . . . It is a well-established principle that, pending the completion of an enforceable executory contract for the sale of real estate, such real estate is regarded as converted into personalty from the time of the execution of the contract, notwithstanding the fact that an election to complete the purchase rests entirely with the purchaser."

Looking at this from a practical point of view, after the contract has been entered into, the primary intention of the vendor or the vendor's assignee is to receive periodical payments from the vendee. It is the contract right to receive such payments that the ven-

dor or his assignee is primarily interested in, and not the possibility of declaring the vendee in default and of eventually foreclosing.

Consequently, the interest of Fairbanks Investment Company is personalty, and is therefore outside the scope of the judgment lien statute, which applies to conveyances of real property.

III. JUDGMENT LIEN STATUTE DOES NOT CONTEMPLATE RECORDATION OF EXECUTORY CONTRACTS FOR SALE OF LAND.

It is clear that the recording statutes and judgment lien statutes contemplate that outright sales or transfers of real property shall be covered. However, many transactions, which might be deemed to affect real property interests, are not necessarily included.

Bamberger v. Geiser, (Or.) 33 P. 609, is a case which is useful in delineating the scope of Alaska recording statutes, since many of the Alaska recording statutes derive from Oregon. The general recording statute of Alaska, §22-3-25, *ACLA 1949,* before it was amended in 1955, read the same as the analogous Oregon statute:

> "*Invalidity of unrecorded conveyance against subsequent innocent purchaser.* Every conveyance of real property within the Territory hereafter made which shall not be filed for record as provided in this chapter, shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

The present wording of the above statute is given under sec. I, par. 7, supra.

In commenting on the effect of recording an assignment of a mortgage, and whether such recordation would give constructive notice or not, the Oregon court said at page 612 of the *Bamberger* case, quoting with approval from *Trust Co. v. Shaw,* 5 Sawy. 340:

> ". . . An assignment of a mortgage may be made by an instrument in the form of a conveyance, and in such case may be admitted to record. But an assignment of a mortgage may be a mere writing under the hand of the assignor, declaring that he thereby assigns the mortgage to a person therein named. Such a writing is effectual to pass a lien of the mortgage, but it would not be entitled to record unless acknowledged and certified; . . . In the absence, then, of any legislative direction to that effect, there does not seem to be any obligation resting upon an assignee to record his assignment to protect himself against any subsequent purchaser or mortgagee."

The *Bamberger* case was cited with approval in *Fischer v. Woodruff,* Wash., 64 P. 923. There the court stated at page 924:

> "As the purpose of these acts is to protect subsequent bona fide purchasers and incumbrancers against prior unrecorded liens and conveyances, their propriety and utility may be conceded; but registration of instruments affecting property rights and titles is purely the creation of the statute, and, unless the statute requires the assignee of a mortgage to record the assignment, he is not guilty of negligence in failing to do so . . . "

The position of the assignee of a seller under a contract of purchase and sale is analogous to that of the assignee of the mortgagee referred to in the above cases. (Tr. 7-8.) Financial institutions often treat the interest of a vendor under an executory contract for sale of land and providing for monthly payments, or notes evidencing same, as in the nature of a mortgage.

In absence of any statutory direction requiring the assignee of a land vendor to record an assignment, he is not guilty of negligence in failing to do so, nor is he obligated to do so to protect himself against any subsequent purchaser of the vendor's interest in the contract. Again, there is no indication that the legislature intended to give a holder of a subsequent judgment lien any greater dignity, or rights, or protection.

There is an obvious distinction between the position of the vendee and his assignee, and that of the vendor and his assignee. When a vendee under an executory land contract, or his assignee, negotiates and bargains with respect to a certain piece of property, he bargains with intent to acquire ownership, possession, and control of real property. On the other hand, the vendor, or his assignee, bargains and negotiates with intent to relinquish title, possession, and control of real estate, and in its place to acquire personal property, ordinarily money or the right to receive money.

IV. APPELLANTS' POSITION IS NOT SUPPORTED BY THEIR AUTHORITIES.

The cases cited by the appellants fail to support the arguments they present. They do not apply to the facts presented in this cause.

Thus, in *Kooper v. Haas,* 164 N.E. 23 (p. 12 of the appellants' brief), there is an attempted dedication and an acceptance, both of which did not appear as a matter of record in the Torrens registrar's office. The following statement of the court at p. 26 of the opinion should be noted, however:

> "* * * The lien of an ordinary judgment is general, and extends only to the property right which the owner owns in premises, subject to the equities in it at the date of judgment. It is limited to the actual interest of the judgment debtor. * * * Unless the judgment creditor is able to point to some statute specifically giving him a right to a greater interest than that which the judgment debtor actually owns, he is limited to that right. Section 30 of the Conveyance Act (Smith-Hurd Rev. At. 1927, c. 30, §29), provides that deeds, mortgages, and other instruments in writing, which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice. By this section a judgment creditor is entitled to priority over the holder of an unrecorded conveyance. Section 30, however, is intended to apply only to such equities arising against the interest of the judgment debtor as are to be evidenced by instruments required to be recorded. Since no particular form is necessary

> for the establishment of a common-law dedication, such a dedication may arise through circumstances, at least some of which are not susceptible of record. * * *"

In *Pennsylvania Range Boiler Co. v. City of Philadelphia,* 23 A 2nd 723, (appellants' brief, p. 13) there was involved an award in eminent domain, release of future damages, and claim by subsequent purchaser without actual notice thereof. At p. 725 the court stated:

> "* * * Concerning what constitutes notice, it was said, in Re Tabor Street (No. 1), 26 Pa. Super. 167, 173: '* * * whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding * * *' * * *".

In re Frayser's Estate, 82 N.E. 2d 633 (appellants' brief, p. 14), there was a proceeding by an administrator with will annexed against decedents' heirs for authority to execute deed conveying land pursuant to an option agreement executed by decedent. At p. 638 the court observed:

> "* * * A sale of lands is the actual transfer of the title from grantor to grantee by an *appropriate instrument of conveyance.* An agreement to sell lands is a contract to be performed in the future, and if fulfilled results in a sale. * * *" (Italics added.)

In this appeal the following facts are important to keep in mind:

(a) There was an open assignment by the vendors of an executory contract to the appellee. It was not a secret assignment, which was not disclosed by the assignor and the assignee, as was the case in *National Bank v. Chafee,* 73 N.W. 318 (appellants' brief, p. 17).

(b) The assignment in this appeal was of payments under an executory contract, which payments were made by the vendee to a bank, as escrow agent. (There was also a quit-claim deed.)

(c) The possession of the vendee was open and notorious, and admitted by the appellants.

(d) There was no effort by the judgment creditors, the appellants, to ascertain of the vendees in possession as to the nature of their claim, or the claim of the persons under whom they occupied.

The following cases on which appellants depend so much can readily be distinguished on the above facts, as well as on the law, as applied in the *Lynch* case above cited, and as applied in Oregon from where the Alaska statute was taken:

Damron v. Smith, 16 S.E. 807 (appellants' brief, p. 16), (the assignor remained in possession, and no payments were involved under the contract assigned.); *Huffaker v. First National Bank of Brigham City,* 173 P. 903, appellants' brief, p. 17, (no constructive notice could be given by a warranty deed in trust involved in this cause.); *Battersby v. Gillespie,* 220

N.W. 480, appellants' brief, p. 17, (the recording statute involved was different from that involved in Alaska, and apparently the parties to the cause failed to consider the claims of the vendor under which the parties in possession occupied.); *Salisbury v. LaFitte,* 141 P. 484, appellants' brief, p. 17, (this case involved an option from an owner to purchase real estate.); *Johnson v. Strong,* 20 NYS 392, appellants' brief, p. 17, (in this cause there was indication that the vendee had abandoned his contract.).

CONCLUSION.

For the various reasons above stated, it is respectfully submitted that the decision of the trial court should be affirmed.

Dated, Fairbanks, Alaska,
February 9, 1959.

WALTER SCZUDLO,
Attorney for Appellee.